In *Wicks* v. *Dowell* [11] the work and the conditions of the work in which the injured employee was engaged at the time of the accident were considered to have brought about the fall which was the *causa proxima* of his injuries. On the other hand in *Butler* v. *Burton-on-Trent Union* [12] a workhouse master, who fell from the top of a flight of stairs, where he was sitting on evening duty, because of a fit of tubercular coughing, was denied recovery on the ground that the accident did not arise out of the employment and was not due to anything to which the employment required him to expose himself, and hence the work he was doing did not help to cause the injuries in any material degree. But even this test will not explain the *dicta* in some of the cases, though a further consideration of them here would be useless.

So even in the light of the cases that have arisen it is doubtful if any general principles do exist. In *Haley* v. *United Collieries,*[13] Lord Kyllachy in discussing the question, said, "It cannot be solved by reference to any formula or general principle, but must always depend on the circumstances of each case." That Lord Loreburn likewise shares this opinion is evident from the following statement: "Other cases are only useful as illustrations of the way in which these words are applied, and nothing is more fruitless than to attempt to argue by analogy from one set of facts to another set of facts".[14]

As the purpose of a workman's compensation act is to provide compensation to the injured employee without his being forced to spend his wages in endless litigation, any act containing these words would seem to have partially failed in its purpose. It is noteworthy that six states, including Pennsylvania,[15] have omitted the words "arising out of" from their respective acts thereby undoubtedly preventing a great amount of unnecessary litigation.

D. R. H.

TORTS—LORD CAMPBELL'S LEGISLATION—DOES A RECOVERY OF DAMAGES BY DECEDENT BAR AN ACTION FOR DEATH BY HIS ADMINISTRATOR?—At common law, the right of action for an injury to the person abated upon the death of the party injured,[1] according to the familiar maxim, *actio personalis moritur cum persona;* and by a second rule, no civil action could be maintained against any-

[11] *Supra,* note 6.

[12] 5 B. W. C. C. 355 (Eng. 1912).

[13] (1906-1907) Scot. Sess. Cas., 214, 216.

[14] Walters v. Stavely Coal & Iron Co., Ltd., 4 B. W. C. C. 303, 305 (Eng. 1911).

[15] Act of June 2, 1915, P. L. 736.

[1] Pulling v. Rwy. Co., 9 Q. B. D. 110 (Eng. 1882); Hadley v. Bryars' Adm'r, 58 Ala. 185 (1877).

one for causing the death of a human being.[2] Lord Campbell's act,[3] passed in England in 1846, and speedily followed in this country, by similar legislation, overthrew these old rules.

This legislation is of two classes: first, acts which may be called "survival acts," which abolish the first of the common law rules mentioned above, and provide that the decedent's cause of action against the wrongdoer shall survive, either for the benefit of his estate generally, or for the benefit of certain persons named in the statute; second, those which, based more or less directly on Lord Campbell's act, do away with the second rule, and give substantially a new cause of action to certain described beneficiaries for loss sustained by them due to the death of the injured person. These two kinds of statutes should be clearly distinguished, though in some jurisdictions both provisions are combined in one enactment.

Under Lord Campbell's act and similar acts giving a right of action for death caused by the wrongful act of another, the courts have frequently been puzzled by the question whether such right of action is barred where the decedent himself has during his lifetime recovered damages from the wrongdoer for the injury which subsequently caused his death. This problem is well presented in a recent North Carolina case. A person who was injured by the negligence of another brought an action for the injury and recovered a judgment which was duly satisfied. Later death resulted from the same injury for which this judgment had been rendered. The administratrix of the decedent then brought an action against the wrongdoer, under a statute substantially similar to Lord Campbell's act. The opinion of the court, from which one judge strongly dissented, was that the action was barred by the satisfied judgment recovered by the decedent during his lifetime.[4]

Statutes of the kind under consideration provide in general that whenever the death of any person is caused by the wrongful act, neglect, or default of another, in such a manner as would have entitled the party injured to have maintained an action thereof if death had not ensued, an action may be maintained if brought within twelve months after his death in the name of his executor or administrator, for the benefit of certain relatives.[5] The language

[2] Baker v. Bolton, 1 Campb. 493 (Eng. 1808).

[3] 9 and 10 Vict., Chap. 93.

[4] Edwards v. Interstate Chemical Corporation, 87 S. E. 635 (N. C. 1916).

[5] At the present time there are statutes in force in nearly all the states substantially embodying the provisions of Lord Campbell's Act in so far as the right to maintain an action for wrongful death is concerned, though the terms of the statutes differ in respect to the persons entitled to maintain such action, the persons for whose benefit the action may be maintained, the time of bringing the action, the measure and elements of damages recoverable, and the distribution of the same.

of most of the decisions is to the effect that these statutes are not mere "survival acts", which simply continue the right of action of the party injured, but that they create a new and independent cause of action based on the damages caused to the next of kin by the death of the injured person.[6] However, authorities are not wanting to the effect that these acts simply continue or transmit the right to sue which the decedent would have had if he had lived.[7] This doctrine is usually based on the provision of the statute that the act or default of the defendant must have been such as would have entitled the deceased to recover damages in respect thereof; but this reasoning may be answered by the argument that this provision merely defines the class of actions in which the new liability is granted.

If Lord Campbell's act is in essence merely a "survival statute", obviously a recovery of damages or a release by the injured party during his lifetime would bar the maintenance of an action by his representative after his death. But if as said by the court, in one of the first cases that arose under the act,[8] "this act does not transfer this right of action to his representative, but gives to his representative a totally new right of action, on different principles", it may be cogently argued that the decedent cannot during his lifetime release or bar the right of action which the surviving members of his family have for the pecuniary loss resulting to them from his death. It is, however, quite uniformly held that where a person whose death is caused by the wrongful act of another has, in his lifetime, executed a due and proper release to the wrongdoer of all claims for damages on account of the wrongful act, no right of action for the death exists in favor of the heirs or personal representatives of the deceased.[9] From this it will be seen that too much reliance cannot be placed on general words of the courts in saying that Lord Campbell's act creates an entirely distinct cause of action.

The majority of decisions, both in England and America, are in accord with the principal case.[10] There are, however, vigorous dissents in many of these decisions, and a few cases actually hold

[6] Maiorano v. B. & O. R. R. Co., 216 Pa. 402 (1907); Kling v. Torello, 87 Conn. 301 (1914); Michigan Cent. R. R. Co. v. Vreeland, 227 U. S. 59 (1913).

[7] Strode v. St. Louis Transit Co., 197 Mo. 616 (1906); Louisville Rwy. Co. v. Raymond, 135 Ky. 738 (1909).

[8] Coleridge, J., in Blake v. Midland Rwy. Co., 21 L. J. Q. B. 233 (Eng. 1852).

[9] Thompson v. Rwy. Co., 97 Tex. 590 (1904): Brown v. Chicago, *etc.*, Rwy. Co., 77 N. W. 748 (Wis. 1898); Southern, *etc.*, Co. v. Cassin, 111 Ga. 575 (1900).

[10] Littlewood v. N. Y., 89 N. Y. 24 (1882); Golding v. Knox, 56 Ind. App. 149 (1914).

the contrary view.[11] The minority holding is based on the argument that the statute gives an independent right of action for the *death,* and not merely for the *injury;* and that since this right of action does not accrue until the death,[12] it cannot be barred by the decedent's act.

The reasoning of the courts holding the majority opinion is based on various grounds. Some cases say that the question does not turn upon whether the statutory right of action is a new right or merely a continuation of the right of deceased, but upon the intention of the legislature as gathered from the statute.[13] The theory is that the framers of the act did not intend to create a double liability, but merely a single cause of action for the injury, for which there should be but one compensation. There is a further theory that since the statute provides that the cause of action must be one for which the decedent could have recovered if death had not occurred, it is a condition precedent to recovery by the representative that the injured party himself must have been able to recover;[14] and inasmuch as a recovery by the decedent would of course bar a subsequent action by the same person, the condition of the statute is not met.

The minority view, it seems, has much to commend it. The statute gives a right of action which never before existed, and which is purely the creature of that statute. By it the decedent's family are allowed to recover for the loss to themselves, caused by the death of the injured person, a loss which is entirely distinct from the loss to the decedent himself. The fact that the latter recovered damages during his lifetime for the injury to himself, should not prevent his relatives from subsequently suing for the loss which they suffered independently, by being deprived of the value of his services to them.[15] It might perhaps be said in answer that they would be compensated by the fact that the estate in which

[11] Donahue v. Drexler, 82 Ky. 157 (1884); Schlichting v. Wintgen, 25 Hun 626 (N. Y. 1881).

[12] Bolick v. Rwy., 138 N. C. 370 (1905).

[13] In Littlewood v. N. Y., *supra,* note 10, it is said by Rapallo, J., "The form of expression employed in the act shows that the legislature had in mind the case of a party entitled to maintain an action but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action or who had recovered damages."

[14] See Michigan Cent. R. R. Co. v. Vreeland, 227 U. S. 59 (1913), at p. 70.

[15] Mr. Chief Justice Clark, rendering the dissenting opinion in the principal case, said, "Formerly such cause of action could not be maintained. The legislature has now provided that such cause of action can be asserted. . . . It is now asserted by the personal representative for the first time. It has not been paid, and it has not been compromised, and it did not exist until the death of his intestate, who could not, and indeed did not attempt to settle for such wrongful death. . . . The damages sustained by the wrongful death were given by the statute, and accrued subsequently to the

they share has been increased by the amount of the judgment recovered during the decedent's lifetime; but it is extremely doubtful whether this compensation is in fact more than illusory. Moreover, it has been held that even a judgment *against* the decedent during his lifetime will act as a bar to the statutory action.[16]

The question is of course one of construction. The problem is not what the legislature ought to have made the law, but what in fact it did make the law; and the courts have apparently decided that the intent was to subject the wrongdoer to only one action for his wrongful act. How the courts can reconcile this with the almost universal statement that the statute creates an entirely new, distinct, and independent cause of action,[17] is rather difficult to perceive.

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recovery of the judgment by the intestate for his physical injuries, and the statute does not contemplate that payment for injuries and physical sufferings to the plaintiff's intestate should bar the family of the decedent from recovering for the loss of the value of his services to them. This is a subsequent and greater damage, and accrues to a different party."

[16] Schmelzer v. Central Furniture Co., 252 Mo. 12 (1913).

[17] See the cases cited *supra,* in note 6 and note 8.